IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1782

ROBERT HOWARD,

Petitioner,

v.

CITY OF CINCINNATI, OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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IN THE

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October Term, 1973

No. ———

ROBERT HOWARD,

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v.

CITY OF CINCINNATI, OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioner respectfully petitions this Honorable Court to grant a writ of certiorari to the Supreme Court of Ohio to review a judgment of that Court, which dismissed petitioner's appeal to that Court from a conviction by the Municipal Court of Hamilton County, Ohio.

OPINIONS BELOW

The decision of the Hamilton County Municipal Court is printed herein at Appendix, page 19. The opinion of the Court of Appeals, First Appellate District, State of Ohio,

is printed herein at Appendix, page 20. The decision of the Supreme Court of Ohio is printed herein at Appendix, page 24.

JURISDICTION

On November 30, 1972, petitioner (herein called defendant) was convicted of disorderly conduct for "insulting" behavior in violation of Section 901-D4 of the Cincinnati Code of Ordinances and judgment of conviction was entered by the Municipal Court of Hamilton County, Ohio, on December 3, 1973, the Court of Appeals, First Appellate District, Hamilton County, Ohio, affirmed the judgment. On February 28th, 1974, the Supreme Court of Ohio overruled defendant's motion for an order directing the Court of Appeals to certify the record and dismissed defendant's appeal holding that no "substantial constitutional question exists."

The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1257 and 2101 and Part V of the Rules of this Court.

QUESTIONS PRESENTED FOR REVIEW

1. IS THE CINCINNATI DISORDERLY COUDUCT SECTION 901-D4 UPON ITS FACE AND AS APPLIED, VAGUE AND OVERBROAD, AND PROSCRIBED SPEECH IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES? THE CONSTITUTIONAL QUESTIONS TO BE PRESENTED BY THIS WRIT OF CERTIORARI WERE PRESENTED TO THE HAMILTON COUNTY MUNICIPAL COURT BY WRIT-

TEN AND VERBAL MOTIONS PRIOR TO TRIAL, WERE RENEWED AND PRESERVED AT EACH APPROPRIATE STAGE OF THAT PROCEEDING AND DURING APPELLATE REVIEW.

2. DID THE TRIAL COURT COMMIT ERROR IN NOT SPECIFYING IN THE VERDICT OF GUILTY, WHAT WAS A PROPER EXERCISE OF FREEDOM OF SPEECH AND ACTION, AND WHAT WAS DISORDERLY CONDUCT, VIOLATING BOTH FIRST AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION? WHETHER SECTION 901-D4, CINCINNATI MUNICIPAL CODE, WHICH PROVIDES THAT IT IS "UNLAWFUL FOR ANY PERSON TO WILFULLY CONDUCT HIMSELF OR HERSELF IN A NOISY, BOISTEROUS, RUDE, INSULTING OR OTHER DISORDERLY MANNER WITH THE INTENT TO ABUSE OR ANNOY ANY PERSON," AS WRITTEN AND AS APPLIED TO SPEECH, IS REPUGNANT TO THE FIRST AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES, IS VAGUE AND OVERBROAD IN ITS RESTRAINT UPON THE FREEDOM OF SPEECH, WHERE THE ORDINANCE AT THE TIME OF THE OFFENSE HAD NOT BEEN JUDICIALLY INTERPRETED BY ANY OHIO COURT TO BE CONFINED TO A NARROW AND LIMITED CLASS OF SPEECH NOT ENTITLED TO CONSTITUTIONAL PROTECTION.

3. WERE DISCRETIONARY POWERS OF THE COURT ABUSED IN DENYING RIGHT OF DE-

FENDANT OR HIS ATTORNEY TO INSPECT THE PROBATIONARY PRESENTENCE REPORT, THEREBY PREVENTING COUNSEL *FROM PROPERLY REPRESENTING HIS CLIENT*? THIS ABUSE OF DISCRETION AMOUNTS TO PREJUDICIAL ERROR DEMANDING A REVERSAL IN THAT IT RENDERED THE DEFENDANT WITHOUT COUNSEL.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First, Fifth and Fourteenth Amendments to the United States Constitution are set forth at Appendix, pages 28 and 29. Section 901-D4 of the Code of Ordinances of the City of Cincinnati is set forth at Appendix, page 26. Section 2947.06 Ohio Revised Code, State of Ohio at Appendix, page 27. Section 2929.03 D. Ohio Revised Code, State of Ohio at Appendix, page 28.

STATEMENT OF THE CASE

Defendant-Petitioner, Robert Howard, is a resident of Cleves, Ohio, and has never been previously arrested or convicted of any offense. (R. 15) [1] He is 26 years of age, has a master's degree and is a Phi Beta Kappa. (R. 16)

On October 4, 1972 an affidavit was filed in the Hamilton County Municipal Court by Sandra Zinn alleging "insult" by defendant, Robert Howard, a misdemeanor, namely a violation of a City of Cincinnati Code of Ordinances Section 901-D4, "disorderly conduct".

---

[1] The "R" references are to pages in the transcript of the proceedings in the Trial Court.

The conduct of defendant as to his actions on October 4, 1972, as per the records show that he was admitted to Miss Zinn's home in a normal fashion by ringing the doorbell, admitted by Miss Zinn's roommate, Dora Roe, at 5:30 to 6:00 p.m. and was not in or outside the home more than 10 minutes. Other than leaving her home reluctantly, when asked to leave, defendant left voluntarily and never came back. (R. 17-18) (A. 31, 32)[2] The evidence did not show there was abusive language used or fighting words or words amounting to insult as prescribed by the statute. (R. 4, 5, 7, 8) (A. 30-33)

The above cause came on for hearing before the Honorable Donald G. Monfort, Judge of the Hamilton County Municipal Court and was heard on November 30, 1972. Defendant waived a jury trial, pled not guilty and the evidence was heard by Judge Monfort. Preliminary motion was made to quash the affidavit for insufficiency and unconstitutionality. After argument of counsel, the Court overruled the motion which was excepted to by defendant's counsel. (R. 4, 5) (A. 32, 33)

The Court found the defendant guilty of disorderly conduct and referred the case to the Probation Department and fixed date of sentencing as of January 10, 1973. At the conclusion of the trial and before referring the matter to the Probation Department, the Court was furnished by Attorney for Defendant, the evaluation of the defendant by Rollman Phychiatric Institute which evaluation concluded as follows, on November 6, 1972: "In our opinion the patient is not mentally ill in the legal sense of the word and is not in danger of harming himself or others. He has responded well to treatment and his prognosis is good.". (R. 25)

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[2] The "A" references are to the pages of the Appendix, in which the testimony has been copied.

The cause came on for hearing before Judge Monfort for sentencing. After overruling a motion for a new trial and motion to arrest judgment duly filed within 3 days of verdict, the Court sentenced defendant to 30 days in the workhouse plus costs, suspending the days and put defendant on 720 days or 2 year probation.

On January 24th, 1973, defendant filed a Notice of Appeal to the Court of Appeals from the sentence and judgment of the Hamilton County Municipal Court, cause known as Number 73064. Following verbal motions made to see psychiatric evaluation by the Probation Department, on March 3, 1973, defendant filed a written motion to correct or modify the record, per Appellate Rule 9E. This motion was overruled by the trial court.

The same motion was filed in the Court of Appeals and said motion to correct or modify record was overruled which prevented the Defendant-Appellant from presenting to the Court of Appeals the appeal of the sentence because the record failed to disclose all of the reasons for the sentence. The Court of Appeals apparently thought that a sentence could not be appealed, therefore, with passing on the sentence affirmed the lower Court's decision. (A. 23)

The Supreme Court of Ohio dismissed the appeal on February 28, 1974, for the reason that no substantial Constitutional question existed. (A. 24)

HOW FEDERAL QUESTIONS WERE RAISED

All the constitutional questions raised in this petition were raised in the assignment of errors listed in defendant's appeal to the Court of Appeals, First Appellate District and were decided adversely to defendant in the opinion of the Court of Appeals set forth at Appendix pages 20-22.

Constitutional issues were also contained in defendant's Motion to Quash the Affidavit in the trial court set fourth at Appendix, pages 32-33.

ARGUMENT AMPLIFYING REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

I.

THE CINCINNATI DISORDERLY CONDUCT SECTION 901-D4 UPON ITS FACE AND AS APPLIED, IS VAGUE AND OVERBROAD AND PROSCRIBED SPEECH IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES. THE CONSTITUTIONAL QUESTIONS TO BE PRESENTED BY THIS WRIT OF CERTIORARI WERE PRESENTED TO THE HAMILTON COUNTY MUNICIPAL COURT BY WRITTEN AND VERBAL MOTIONS PRIOR TO TRIAL, WERE RENEWED AND PRESERVED AT EACH APPROPRIATE STAGE OF THAT PROCEEDING AND DURING APPELLATE REVIEW.

Defendant was convicted of a violation of Section 901-D4 of the Cincinnati Code of Ordinances. The disorderly conduct ordinance is unconstitutional on its face, and as applied to defendant does not proscribe conduct which he could reasonably understand.

The relevant part of the affidavit charging the offense in the Municipal Court of Cincinnati gave the date, city, and county of the offense and then the following quote, "did unlawfully and wilfully conduct himself in an insulting manner with intent to annoy some person contrary

to and in violation of 901-D4 of the Cincinnati Municipal Code." Nothing was stated in the affidavit to apprise the defendant of what he did that was insulting.

The conduct of defendant in his attempt to talk to Miss Zinn in her home was indeed in all respects a normal and healthy reaction of a person who through past sharing of ideas, educational accomplishments and a mutual friendship, lead to his wanting to talk to Miss Zinn and see if the affection he had felt for her was truly ill-spent.

In clarifying certain facts as to defendant's actions on October 4, 1972, we note that; (1) Defendant was admitted to Miss Zinn's home in a normal fashion by ringing the doorbell, and when answered was admitted by Miss Zinn's roommate, Mrs. Dora Roe; (2) The time of day was 5:30 or 6:00 p.m. in the evening, certainly not in the night season, or an unusual time for a person to call; (3) Defendant wanted to talk to Miss Zinn (by her own admission); (4) The period of time defendant was in or outside Miss Zinn's home was around 10 minutes.

It is clear from the testimony that the intent of the defendant was *not* to willfully or with intent, conduct himself in such manner as the ordinance allegedly proscribes or any insulting manner. It is difficult to understand from the ordinance what type of conduct defendant could reasonably expect to understand from the notice given by the ordinance and affidavit. At stated in *Palmer* v. *City of Euclid, Ohio* 29 L. Ed 2d 98 (1971) a case decided in a per curiam opinion by the United States Supreme Court on May 24, 1971. Six members of the U.S. Supreme Court held that a suspicious person ordinance was unconstitutionally vague as applied, because it gave insufficient notice. The judgment was reversed and the ordinance was held unconstitutional because it was so vague and lacking in ascertainable standards of guilt that as applied it failed to give

a person of ordinary intelligence fair notice that his contemplated conduct was forbidden . . . Said case uses following language:

"The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

The testimony in the instant case does not beyond a reasonable doubt, prove willfullness or intent to insult by the defendant as is mandatory under the ordinance . . . As shown in *Coates* v. *City of Cincinnati* 29 L. Ed 2d 214 (1971). The U.S. Supreme Court held a City of Cincinnati Criminal Ordinance unconstitutionally vague because it subjects the exercise of the right of assembly to an uncertain standard and is unconstitutionally broad because it authorized the punishment of contsitutionally protected conduct, ie: "conduct that annoys some people does not annoy others. . ."

The Ordinance of the City of Cincinnati DC-901-D4 has been repeatedly before this Supreme Court for the last eighteen months. This ordinance is constantly used because it is so broad that the defendant can always be found guilty as interpreted by the State Courts. There are at least 1,200 (estimated) of these cases a year in Cincinnati and about 95% (estimated) of defendants are found guilty. The *Norwell* v. *City of Cincinnati* 414 U.S. 14, 38 L.Ed.2d 170, 94 S.Ct. 187 (1973) is illustrative. To get justice, Norwell, who had been fined $10.00 and costs, had to incur the expense of filing an appeal to this court for justice. Selective enforcement as illustrated by Norwell, shows conclusively that the State Courts are affirming convictions that clearly violate the constitutional rights of the defendant. Interpretation of State Courts make this ordinance clearly unconstitutional.

This court, on April 15, 1973, had this and similar statutes before it in *Karlan* v. *City of Cincinnati,* —— U.S. —— 35 O.S.2d 34, 298 N.E.2d 573 (1974) together with *Lucas* v. *Arkansas,* U.S. Supreme Court No. 73-544 (1974), *Kelly* v. *Ohio,* U.S. Supreme Court No. 72-1379 (1974) and *Rosen* v. *California,* U.S. Supreme Court No. 72-1738 (1974). All are cited in the dissenting opinion in the *Karlan* case. This court granted the writ of certiorari, vacated the judgment, and remanded to the Supreme Court of Ohio for further consideration in light of *Lewis* v. *City of New Orleans,* 415 U.S. ——, 39 L.Ed.2d. 214.

As stated in *Gooding* v. *Wilson,* 405 U.S. 518 (1972) "it matters not that the words (petitioner) used might have been constitutionally prohibited under a narrowly and precisely drawn statute, for petitioner may attack an overly broad statute without demonstrating that his own conduct could not be regulated by a more precisely drawn act." *Gooding* v. *Wilson,* 405 U.S. 518 at 520-521 (1972).

We respectfully submit that Certiorari should be granted in this case, judgment set aside and the Cincinnati Ordinance 901-D4 declared unconstitutional.

2.

THE TRIAL COURT ERRED IN NOT SPECIFYING IN THE VERDICT OF GUILTY WHAT WAS A PROPER EXERCISE OF FREEDOM OF SPEECH AND ACTION, AND WHAT WAS DISORDERLY CONDUCT, VIOLATING BOTH FIRST AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION. WHETHER SECTION 901-D4, CINCINNATI MUNICIPAL CODE, WHICH PROVIDES THAT IT IS "UNLAWFUL FOR ANY PERSON TO WILFULLY CONDUCT HIMSELF OR HERSELF IN A NOISY, BOISTEROUS, RUDE, INSULTING OR OTHER DISORDERLY MANNER WITH THE INTENT TO ABUSE OR ANNOY ANY PERSON," AS WRITTEN AND AS APPLIED TO SPEECH, IS REPUGNANT TO THE FIRST AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES, IS VAGUE AND OVERBROAD IN ITS RESTRAINT UPON THE FREEDOM OF SPEECH, WHERE THE ORDINANCE AT THE TIME OF THE OFFENSE HAD NOT BEEN JUDICIALLY INTERPRETED BY AN OHIO COURT TO BE CONFINED TO A NARROW AND LIMITED CLASS OF SPEECH NOT ENTITLED TO CONSTITUTIONAL PROTECTION.

Under freedom of speech defendant had a right to urge his cause. He went to Miss Zinn's home in a gentlemanly manner, rang the bell in the usual way, and asked for Miss Zinn. Certainly up to this point there was nothing but an exercise of freedom of movement and speech. He sat down

and talked to Miss Zinn, certainly nothing but an exercise of freedom and speech. Miss Zinn asked him to leave. Defendant admits he did leave reluctantly. Certainly nothing up to this time was insulting. He left the premises voluntarily and never came back. Certainly none of this was insulting and was a fair exercise of his freedom of speech and movement. The Court was required to find what was freedom of speech and whas was illegally done in violation of the Disorderly Conduct Ordinance. This was not done, but a general verdict of guilty was given by the Court. The requirement is clearly set forth in *City of Cleveland* v. *Mechanic*, 26 O.A.2d 138 (1971), syllabus 3:

> 3. "Where a finding of guilt under a disorderly conduct ordinance is based on a mix, partially for what is said in exercise of the right of free speech and partially for what is illegally done, the conviction cannot stand. So vital is free expression that even ambiguity will taint the finding."

This requirement makes it necessary that the case be reversed, syllabus 4, same case, as follows:

> "Where the judgment in the trial court is based on a mixture of protected free expression and unprotected, illegal acts, it is improper to remand the case to the trial judge for a post hoc explanation of the basis for decision."

This Court of Appeals decision is supported by decisions of the U.S. Supreme Court among which is *Plummer* v. *City of Columbus*, 38 L.Ed.2d 3 at page 5, decided October 15, 1973. We quote, "and if the law is found deficient, it may not be applied to defendant either until and unless a satisfactory limiting construction is placed on the ordinance. The ordinance in effect is stricken down on its face," *Gooding* v. *Wilson*, 405 U.S. 518 (1972).

It is impossible with the overbroad ordinance and the general verdict of the trial Court to determine whether permitted activity was taken into consideration in arriving at the verdict in reference to Robert Howard.

3.

DISCRETIONARY POWERS OF THE COURT WERE ABUSED IN DENYING RIGHT OF DEFENDANT OR HIS ATTORNEY TO INSPECT THE PROBATIONARY PRESENTENCE REPORT, THEREBY PREVENTING COUNSEL FROM PROPERLY REPRESENTING HIS CLIENT. THIS ABUSE OF DISCRETION AMOUNTS TO PREJUDICIAL ERROR DEMANDING A REVERSAL IN THAT IT RENDERED THE DEFENDANT WITHOUT COUNSEL.

The statute on probationary reports is *Ohio Revised Code* 2947.06 as shown in the appendix, page 27.

The instant case does not represent the ordinary set of circumstances. The defendant was at the time of the alleged offense under psychiatric treatment as prescribed by his personal physician and the doctor at Rollman Psychiatric Institute. A copy of the Rollman Report was given to the Court. The Court then chose not to base his sentence upon the Rollman report, but said he would have his probation department make an evaluation.

While the defendant was given thirty days suspended sentence and costs, the probation was in effect an alternative sentence; thirty days or have an unknown course to be prescribed by the probation department which we would presume could include institutionalizing the defendant. The attorney for the defendant asked he be permitted to

see such report which was refused on the ground it was against the Court's policy to do this. "I usually do not make it a policy of turning a report over to counsel".

Subsequently the defendant, by his attorney, filed a motion to include these reports as part of the record, in both the trial Court and the Court of Appeals. The Courts overruled this motion and would not require including of the Rollman or probation report as part of the record, which was excepted to by defendant.

The Court must use it's discretion for it's refusal, not simply have a policy applying to all cases, which is in effect what the Court did here. See *U.S.* v. *Bryant*, 442 F2d 775 at 776 (1971):

> "Discretion whether and to what extent defendant or his counsel is to have access to the presentence report, with accompanying opportunity to comment upon it, must be exercised in each individual case; sound judicial administration requires that such discretion has been exercised appear on the face of the record." Supra, page 778: "If the judge has concluded that in the circumstance before him in the particular case no part of the report should be disclosed to either defendant or his counsel, it should not be unduly burdensome for him to make an appropriate statement on the record."

What the defendant did here in case at bar did not justify a 30 day sentence or an alternate sentence of 2 years on probation, therefore the court was governed on the unrevealed probationary report. There is nothing secret about defendant's psychiatric treatment. The secrecy consisted of whether these treatments were probably going to be continued or a new approach made. Counsel for defendant was unable to represent his client at the sentencing without this information.

For a fine discussion of this subject, see *State of New Jersey* v. *Henry Kunz*, 259 A.2d 895, see page 899:

> "The significant movement towards mandatory disclosure is undoubtedly being influenced not only by the persuasive academic writings but also by the recent Supreme Court decisions which have greatly expanded and strengthened the individual rights of the accused. Thus he is entitled to counsel throughout all critical stages of the proceedings." *Gideon* v. *Wainwright* 372 U.S. 335, 83 S.Ct. 792, 9 L.ED.2d 799 (1963) including the sentencing. *Mempa* v. *Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.ED.2d 336 (1967).

Case Supra at page 900, the Court uses the following language:

> "Certainly if the defendant has the right to have an appellate court pass on the validity of his sentence and, in so doing, consider the presentence investigation on which the sentence was based, how can this process operate intelligently unless the defendant knows enough about the report to challenge it where necessary and unless the Court has the report in front of it? Certainly if the defendant can raise issues about the report, he has a right to examine it to see whether it is legally adequate in his case. And it seems evident that if the presentence investigation is part of the record on the sentence, then it should be made a part of the record in the appellate court on any review of the sentence."

This trend is followed in *State* v. *Pierce*, 108, Arizona, 174, 494 P.2d 696, (1972), *American Bar Association Standards for Criminal Justice Sentencing Alternatives and Procedures*, 213-214 (1968) recommended as follows: 4.4

> "(a) Fundamental fairness to the defendant requires that the substance of all derogatory information which adversely affects his interests and which has not other-

> wise been disclosed in open court should be called to the attention of the defendant, his attorney, and others who are acting on his behalf."

This statement and whole recommendation was adopted by The Supreme Court of Arizona in *State* v. *Pierce*, supra.

Ohio Revised Code Section 2947.06, Appendix, page 27, which makes it optional whether defendant or his attorney be furnished probationary reports is unconstitutional and clearly violative of the 5th Amendment of the U.S. Constitution requiring due process. The recent Criminal Code of the State of Ohio, effective January 1, 1974, recognizes this principle of due process by making it an obligation to furnish probationary reports to defendant or his attorney. In certain situations, mainly aggravated homicide cases, i.e., *Ohio Revised Code* 2929.03 D, Appendix page 28, if due process requires the mandatory disclosure of probationary reports in aggravated homicide cases, then it should be required in all cases under the 5th amendment of the U.S. Constitution.

This type of ordinance is applied more than any other law except probably traffic ordinances, therefore of great general interest and application.

CONCLUSION

For the reasons set forth above, certiorari should be granted.

Respectfully submitted,

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APPENDIX

FINDINGS AND DECISION OF TRIAL COURT, CASE NO. 10887 HAMILTON COUNTY MUNICIPAL COURT (JUDGE MONFORT) NOVEMBER 30, 1973

THE COURT: Thank you, gentlemen. The Court has heard the evidence in this case consisting of the testimony of the witnesses for the prosecution and the testimony of the defendant, himself. Since a jury was waived here, we are sitting here as both Judge and jury, and having reviewed the evidence and considered the evidence and also the demeanor of the people as they testified, it is the opinion of this Court that the prosecution has proven beyond all reasonable doubt the guilt of the defendant. Therefore, there will be a finding of guilty.

NOTE: Case referred to the Probation Department and sentencing set for January 10, 1973.

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

NO. C-73064

CITY OF CINCINNATI,
Plaintiff-Appellee,

vs.

ROBERT HOWARD
Defendant-Appellant.

MEMORANDUM OPINION

(Filed December 3, 1973)

Messrs. Thomas A. Luebbers, Ralph E. Cors and John S. Moraites, 222 E. Central Parkway, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Mr. W. Ray Skirvin, 1403 Post-Times Star Building, Cincinnati, Ohio 45202, for Defendant-Appellant.

MILLER, J.

Defendant, appellant herein, appeals from a conviction in the Hamilton County Municipal Court for violating Section 901-D4 of the Cincinnati Municipal Code.

He sets forth three assignments of error as follows:

1. Section 901-D4, Cincinnati Code of Ordinances, is unconstitutional upon its face and as applied, is vague and overbroad, and proscribed speech in violation of the first and fourteenth amendments to the Constitution of the United States.

2. The trial court erred in not specifying in the verdict of guilty, what was a proper exercise of freedom of speech and action, and what was disorderly conduct.

3. Discretionary powers of the court were abused in denying right of defendant or his attorney to inspect probationary presentence report, thereby preventing counsel from properly representing his client.

As to defendant's first assignment of error, the answer lies in *Cincinnati* v. *Hoffman*, 31 Ohio St. 2d 163. The Supreme Court in considering and upholding Section 901-D4 said in the syllabus to that case:

> "1. A city ordinance making it 'unlawful for any person to willfully conduct himself or herself in a noisy, boisterous, rude, insulting or other disorderly manner, with the intent to abuse or annoy any person', is not so vague that men of common intelligence must necessarily guess as to its application and does not lack ascertainable standards of guilt. (*Connolly* v. *General Construction Co.*, 269 U.S. 385; *Palmer* v. *Euclid*, 402 U.S. 544).
>
> "2. To willfully conduct oneself in a noisy, boisterous, rude, insulting or other disorderly manner, with the intent to abuse or annoy another, is to perform such conduct with an evil or wrongful purpose, and a city ordinance proscribing such behavior does not prohibit the lawful exercise of any constitutional right of the lawful enjoyment of any constitutionally protected freedom. (*Colten* v. *Kentucky* [June 12, 1972] 32 L. Ed. 2d 584).

Assignment number one is not well taken.

Defendant relies on *Cleveland* v. *Mechanic*, 26 Ohio App. 2d 138, as controlling in assignment number two. However, it is noted in that situation both constitutionally protected freedom of speech and unprotected conduct were included in the affidavit. A finding of "guilty as charged"

effectively proscribed protected speech as well as illegal conduct thereby rendering the conviction reversible. Here, there is no finding as to any protected freedom and no necessity to render any verdict other than a general verdict of guilty, which the trial court did. Assignment of error number two is overruled.

Assignment number three is answered in the language of the statute, R. C. Section 2947.06, which reads in part: ". . . The court of its own motion may direct the department of probation of the county wherein the defendant resides, or its own regular probation officer, to make such inquiries and reports as the court requires concerning the defendant, and such reports shall be confidential and need not be furnished to the defendant or his counsel or the prosecuting attorney unless the court, in its discretion, so orders." The court stated, "I usually do not make it a policy of turning a report over to counsel." This we do not find an abuse of the court's discretion, and overrule the third assignment of error.

It is, therefore, ordered that the judgment of the Hamilton County Municipal Court be affirmed.

Judgment affirmed.

GUERNSEY, P. J. and Cole, J., CONCUR.

GUERNSEY, P. J., COLE AND MILLER, J. J., OF THE THIRD APPELLATE DISTRICT, SITTING BY ASSIGNMENT IN THE FIRST APPELLATE DISTRICT OF OHIO.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Memorandum Opinion.

COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

NO. C-73064

CITY OF CINCINNATI,

Appellee,

vs.

ROBERT HOWARD,

Appellant.

JUDGMENT ENTRY

(Entered December 3, 1973)

This cause came on to be heard upon the appeal on questions of law, assignments of error, the record from the Hamilton County Municipal Court, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that the assignments of error are not well taken for the reasons set forth in the Decision filed herein and made a part hereof.

It is, therefore, Ordered by the Court that the judgment of the Municipal Court of Hamilton County, Ohio, be, and the same hereby is, affirmed.

It is further Ordered that a mandate be sent to the Municipal Court of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment, with a copy of the Decision attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellant, by his counsel, excepts.

THE SUPREME COURT OF OHIO
1974 TERM

To wit: February 28, 1974

THE STATE OF OHIO,)
)
City of Columbus.)

No. 74-42

City of Cincinnati,

Appellee,

vs.

Robert Howard,

Appellant.

APPEAL FROM THE COURT OF APPEALS
for HAMILTON COUNTY

This cause, here on appeal as of right from the Court of Appeals for HAMILTON County, was heard in the

manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for HAMILTON County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and seal of the Court this ..... day of ..... 19 .....

..... Clerk

..... Deputy

CODE OF ORDINANCES OF THE CITY OF CINCINNATI

Section 901-D4 of the Code of Ordinances of the City of Cincinnati:

Disorderly Conduct.

"No person shall wilfully conduct himself or herself in a noisy, boisterous, rude, insulting or other disorderly manner, with the intent to abuse or annoy any person or the citizens of the city of any portion thereof, or disturb the peace, good order and quiet of the city by provoking or engaging in a fight or quarrel, or permit or suffer such act or acts made unlawful herein to be committed on or about his or her house, or any premises attached thereto.

For the purpose of enforcing the provisions of this section, it shall be lawful for any officer to enter any house, outhouse, garden or place of amusement to arrest any person violating any of the provisions of this section.

Whoever violates this section shall be fined not more than one hundred dollars ($100.00), or imprisoned not more than thirty days (30), or both, for a first offense, and for a second or subsequent offense shall be fined not more than one hundred dollars ($100.00), or imprisoned not more than ninety (90) days, or both."

OHIO REVISED CODE

SENTENCING

Section 2947.06 *Ohio Revised Code,* Testimony after verdict to mitigate penalty; reports confidential.

"The trial court may hear testimony of mitigation of a sentence at the term of conviction or plea, or at the next term. The prosecuting attorney may offer testimony on behalf of the state, to give the court a true understanding of the case. The court shall determine whether sentence ought immediately to be imposed or the defendant placed on probation. The court of its own motion may direct the department of probation of the county wherein the defendant resides, or its own regular probation officer, to make such inquiries and reports as the court requires concerning the defendant, and such reports shall be confidential and need not be furnished to the defendant or his counsel or the prosecuting attorney unless the court, in its discretion, so orders.

The court may appoint not more than two psychologists or psychiatrists who shall make such reports concerning the defendant as the court requires for purpose of determining the disposition of the case. Each psychologist or psychiatrist shall receive a fee to be fixed by the court and taxed in the costs of the case. Such reports shall be made in writing, in open court, in the presence of the defendant, except in misdemeanor cases in which sentence may be pronounced in the absence of the defendant. A copy of each such report of a psychologist or psychiatrist may be furnished to the defendant, if present, who may examine the persons making the same, under oath, as to any matter or thing contained therein."

IMPOSING SENTENCE FOR A CAPITAL OFFENSE

Section 2929.03 *Ohio Revised Code*, Imposing sentence for a capital offense.

(D) "When death may be imposed as a penalty for aggravated murder, the court will require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation."

CONSTITUTION OF THE UNITED STATES, FIRST AMENDMENT

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

CONSTITUTION OF THE UNITED STATES, FIFTH AMENDMENT

"No person shall be held to answer for a capial, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in land

or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

CONSTITUTION OF THE UNITED STATES FOURTEENTH AMENDMENT

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS CASE NO. 10887 CITY OF CINCINNATI v. ROBERT HOWARD NOV. 30, 1972

DIRECT EXAMINATION OF SANDRA ZINN

By Mr. Moraites:

Q. Do you know the defendant, Robert Howard?
A. Yes, I do.
Q. How long have you known him?
A. About five years.
Q. And, um, you used to go with him?
A. Yes, I did.
Q. How long ago did you break up with him?
A. Four years ago.
Q. Four years ago?
A. Yes.
Q. Did you see him recently, on the 4th of October, 1972?
A. Yes.
Q. Where?
A. In my home.
Q. Um, was he invited to your home?
A. No, he wasn't.
Q. Where is your home, in Batavia?
A. We are living — 1504 Aster Place.
Q. City of Cincinnati, Hamilton County, State of Ohio?
A. Yes, it is.
Q. And, um, what time of the day or night was this?
A. About 5:30 or 6:00 in the evening.
Q. And, um, what did Mr. Howard do that caused you to file this affidavit.
A. Well, Mr. Howard, as he has on a number of occasions, asked me to listen to him and be concerned with

his reasons why he would like me to see him again and, um, he also did as he has in the past in a more oblique manner suggested that if he couldn't have me, he would rather kill me. — (p. 7-8)

DIRECT EXAMINATION OF ROBERT HOWARD

[17] Mr. Skirvin: Q. How did you get into the house?

Mr. Howard: A. Miss Martin (also known as Mrs. Roe) opened the door to me.

Q. Did you ring the bell in the customary way?

A. Yes.

Q. And she opened the door?

A. I believe there was a bell, and she came to the [18] door and inquired what it was that I wished and I said, "I'm looking for Miss Sandy Zinn," and when I said it I could see Sandy across the room and I pointed at her and said, "That is her, who I want to see."

Q. Did Miss Martin let you in?

A. Um-hum.

Q. And, um, did she tell you to take a chair or anything?

A. Yes, I was wearing over shoes at the time. It was raining and I asked if I should take them off and she said, "No, sit here," and she motioned me to a chair.

Q. And you were sitting in that chair a great deal of the time you were talking with Sandy?

A. All of the time that I was talking to Sandy, until she finally came over by the door and ordered me out, yes.

Q. When you got up, what did you do then?

A. I got up slowly, I admit. I did not want to leave. I wanted to talk to Sandy, um, but she kept insisting that I leave and I get out, so I had no choice but to comply, also, I admit, with reticence.

Q. But you never refused to go or anything, you were just kind of slow in acting, isn't that the way it was?

A. That's correct. I did not want to leave. But at the same time, she left me no – no way to stay. —— (pp. 17-18)

DEFENDANTS MOTION TO QUASH OVERRULED

MR. SKIRVIN: I want to make a motion to quash, which I will furnish a written motion before I leave, on the ground that no offense is stated in the affidavit. The affidavit consists of one word in it, I think "insult," but they have attached to it a written statement that they –

THE COURT: The affidavit is the only thing.

MR. SKIRVIN: The affidavit says insult, it doesn't say what was done at all, except as I started to say they have attached a statement of the prosecuting witness for the affidavit. I though you were going to take into consideration the attached statement to the affidavit and I thought it was considered. Otherwise, I don't see anything on the affidavit at all if you just put insult in it. That comes to the second question, and that is whether or not the ordinance, itself, is unconstitutional. Now, I have a copy here, if the Court would like a copy of it.

THE COURT: That's all right.

MR. SKIRVIN: And I base that on the case of Coates vs. City of Cincinnati, um, cited as 29 L.ED. 2d, page 214. * * * It has been left to the police and the Court to decide when and to what extent the ordinance is applicable, an unconditional exercise of police power, and that is what I claim this ordinance does. The ordinance says: noisy, boisterous, rude, insulting or otherly disorderly manner. Now, I don't know what that would mean. With the intent to abuse or annoy any citizen or the citizens of

Cincinnati, or any portion thereof, or to disturb the peace, or engaging in a fight or trial or to commit or suffer such as and so forth. I submit that first of all, an offense is not stated and if it is stated, then this ordinance is unconstitutional.

THE COURT: Mr. Moraites, your response?

MR. MORAITES: It has been held constitutional is all I can tell you, Judge.

THE COURT: We have rather a bare minimum situation. However, the ordinance is held constitutional. The word insulting would be about the most minimal statement in there. However, that is according to the statute. The motion will be overruled and your exceptions will be noted. May we proceed to trial? —— (pp. 4-5)

FILED
JUN 27 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1973

NO. 73-1782

ROBERT HOWARD,

Petitioner,

v.

CITY OF CINCINNATI, OHIO,

Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

MR. THOMAS A. LUEBBERS
City Solicitor

MR. PAUL J. GORMAN
Municipal Court Prosecutor

MR. JOHN S. MORAITES
First Assistant Municipal Court Prosecutor

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1973

NO. 73-1782

ROBERT HOWARD,

Petitioner,

v.

CITY OF CINCINNATI, OHIO,

Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

MOTION TO AFFIRM OR DISMISS

The Appellee-Respondent moves the Supreme Court of the United States to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the Supreme Court of Ohio and the Court of Appeals of Ohio for the First Appellate District, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINION BELOW

The opinion of the Ohio Supreme Court and of the Court of Appeals, First Appellate District of Ohio appear respectively in Petitioner's Appendix thereto at pages twenty-four and twenty as numbered therein.

STATEMENT OPPOSING JURISDICTION

Jurisdiction does not lie with respect to the instant petition presented by Appellant-Petitioner for the reasons enumerated below:

a. Petitioner's conduct in forcing his way into the complainants' home and the defendant's repeated refusal to leave the premises constitutes the underlying basis for his conviction under the Cincinnati, Disorderly Conduct Ordinance, 901-D4.

b. Defendant's verbal threats to "kill" the complainant are only incidental to the conduct of the defendant's persistent refusal to leave a private premises.

c. The defendant while invading the complainant's constitutional right to privacy cannot now claim injustice under the guise of the First Amendment to the United States Constitution.

Clearly, Petitioner presents no important statutory, factual or constitutional issues as a basis for granting certiorari. The decisions rendered by the courts below with respect to the facts as presented in the instant case are correct and Appellee-Respondent through a Motion to Affirm or Dismiss, herein contained, moves this Honorable Court to dismiss Appellant's petition for lack of jurisdiction.

QUESTIONS PRESENTED

I.

SECTION 901-D4, CINCINNATI MUNICIPAL CODE, WHICH PROVIDES THAT IT IS "UNLAWFUL FOR ANY PERSON TO WILFULLY CONDUCT HIMSELF OR HERSELF IN A NOISY, BOISTEROUS, RUDE, INSULTING, OR OTHER DISORDERLY MANNER WITH THE INTENT TO ABUSE OR ANNOY ANY PERSON", COMPLIES WITH THE CONSTITUTIONAL PRENUMBRAS OF THE FIRST AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES, AND IS NOT VAGUE OR OVERBROAD.

II.

THE UNITED STATES SUPREME COURT HAS DECIDED THE REQUISITE STANDARDS AS TO THE CONSTITUTIONAL VALIDITY OF THE DISORDERLY CONDUCT STATUTES AND THE CINCINNATI DISORDERLY CONDUCT ORDINANCE AS APPLIED TO THE FACTS HEREIN COMPLIES WITH THOSE REQUIREMENTS.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fourteenth Amendments of the United States Constitution and Section 901-D4, Cincinnati Municipal Code, are set forth in Appellant-Petitioner's Appendix at pages twenty-eight, twenty-nine and twenty-six respectively therein.

STATEMENT OF THE CASE

Defendant-Petitioner, Robert Howard, by his own admission testified at the trial that he had no contact with the complainant for a period of four (4) years preceding the date in question. Defendant further testified that he has been under psychiatric care and presented a statement from the psychiatric clinic administering treatments.

At trial, the defendant testified that he attempted to contact the complainant by telephone and that said complainant refused to see him and hung up on him. When asked upon cross examination,

> (Prosecutor) "Q. Do you understand that this girl doesn't want to see you anymore?"

The defendant's reply was,

> (Defendant) "A. . . . Yes".

The instant defendant never denied that he threatened to "kill" the complainant and in fact testified that:

> "she" (complainant) "kept insisting that I leave" . . . "I did not want to leave."

Also testifying at trial was the complaining witness who is a social worker for the Welfare Department. The complainant testified that on a number of occasions, previous to the date in question, that Robert Howard threatened her even though she had not seen him in four (4) years:

> (Complainant) ". . . that if he couldn't have me, he would rather kill me."

In order to avoid confrontation with the defendant, the complainant gave the post office a change of address. Even though it was necessary to tell the defendant twice, by his

own admissions, on the telephone to stay away, the defendant drove to the town where the complainant lived. The defendant then paid the sum of $1.00 (one dollar) to obtain the complainant's address.

Upon cross-examination by the defense, the prosecuting complainant testified that:

1. Robert Howard forced his way into her home on the date in question,
2. "I asked him to leave several times' but the defendant refused and "persisted in trying to question my roommate . . .",
3. ". . . After being asked numerous times to leave", he finally went out on the porch, leaving his foot in the door . . ."
4. Defendant Howard, with his foot in the door, threatened to kill the complainant, whom he had not seen for four years.

   ". . . he stated that if he couldn't have me, he would kill me."

In addition to the above, the complainant's roommate testified that she heard loud voices and that the prosecuting witness repeatedly asked the defendant to leave the premises, but that the defendant refused to leave.

The instant case was tried without a jury and the defendant was found guilty by the trial court. There was no incarceration imposed at sentencing of instant defendant.

Thereafter, an appeal was taken to the First District Court of Appeals of Ohio on behalf of the defense, and the judgment of the trial court was affirmed. Further appeal to the Ohio Supreme Court resulted in dismissal of the appeal for the reason that no substantial constitutional question exists herein.

THERE IS NO SUBSTANTIAL CONSTITUTIONAL QUESTION HEREIN INVOLVED AND THIS CASE IS NOT OF GREAT OR GENERAL PUBLIC INTEREST

This case does not involve any constitutional issues as the conduct engaged in by the instant petitioner is clearly within the peripheria of the narrowly construed Cincinnati, Disorderly Conduct Ordinance and never did fall within that class of constitutionally protected speech and conduct.

It is emphasized that the United States Supreme Court in *Cox* v. *Louisiana*, 379 U.S. 536 (1965), emphatically rejected the very contentions that the instant defendant attempts to set forth. Precisely:

> "It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written or printed." *Cox* v. *Louisiana*

The right of free speech, while fundamental in our democratic society was not intended by the framers of the Constitution to make a course of conduct unpunishable merely because the defendant speaks during the commission of a crime.

The decision below is correct without regard for the questions sought to be raised by the petition and in view of all facts this case clearly does not warrant review by this Court.

ARGUMENT FOR DENIAL OF WRIT

I

SECTION 901-D4, CINCINNATI MUNICIPAL CODE, WHICH PROVIDES THAT IT IS "UNLAWFUL FOR ANY PERSON TO WILFULLY CONDUCT HIMSELF OR HERSELF IN A NOISY, BOISTEROUS, RUDE, INSULTING, OR OTHER DISORDERLY MANNER WITH THE INTENT TO ABUSE OR ANNOY ANY PERSON", COMPLIES WITH THE CONSTITUTIONAL PRENUMBRAS OF THE FIRST AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES, AND IS NOT VAGUE OR OVERBROAD.

As construed by the Ohio Supreme Court, the Cincinnati Disorderly Conduct ordinance does not prohibit the lawful exercise of any constitutional right or the lawful enjoyment of any constitutionally protected freedom.[1] The Ohio Supreme Court in *Cincinnati* v. *Hoffman*, 31 Ohio St. 2d 163 (1972), construed the instant ordinance as not escaping the understanding of any person of "common intelligence" who desires to obey it.

It is emphasized that the facts and issues raised in the instant cases are almost identical to those facts and issues

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[1] *Cincinnati* v. *Hoffman*, 31 Ohio St. 2d 163, 285 N.E. 2d 714 (1972), certiorari denied 93 S. Ct. 1370, 35 L. Ed. 2d 583 (1973). In *Hoffman*, defendants failed to obey numerous requests by police officers to stay out of the police cruiser which held a prisoner. Defendants in *Hoffman* were arrested and charged with conduct being contrary to and in violation of said Cincinnati Disorderly Conduct ordinance.

already decided by this Court in *Colten* v. *Kentucky*, 407 U.S. 104 (1972).[2]

Like *Colten*, instant Petitioner's conduct and speech was not an exercise within the purview of any constitutionally protected freedom. What more fundamental right exists than the constitutionally protected "right of privacy"? The complainant in this case knew that the instant defendant was emotionally unstable and took every precaution to avoid him. Even after a four (4) year separation the instant petitioner maintained his active pursuit of the complainant and finally located her and "forced" his way into her home.

The complainant was fearful for her life and testified at trial that the defendant had "threatened to kill" her on many previous occasions. Said defendant ignored the complainant's repeated pleadings for the defendant to leave the residence. In fact, the defendant refused to leave and stuck his foot into the door which prevented the complainant from shutting him out. Then, once again the instant defendant "threatened to kill" the complainant if "he could not have her".

Consequently, there is no basis for distinction between the facts at bar from *Colten* v. *Kentucky*, 407 U.S. 104 (1972). The defendant here had no constitutional right to force his way into complainant's home, refuse to leave after numerous demands and threaten to kill the complainant. There can be no lawful exercise of any constitutional guarantee under this set of facts.

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[2] *Colten* was arrested for disorderly conduct when he failed to comply with a request given by a police officer in the performance of his duties *Colten* verbally expressed discontent with said officer's request and it was that unprotected speech and conduct which resulted in his conviction. There the United States Supreme Court held that the disorderly conduct statute was not unconstitutionally applied for *Colten* had no constitutional right to observe the traffic ticketing process.

As recently as *Cohen* v. *California,* 403 U.S. 15 (1971), this Court specifically pointed out that the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any circumstances that he chooses.

In keeping within the guidelines as set forth in *Gooding* v. *Wilson,* 92 S. Ct. 1103 (1972), as applied in *Cincinnati* v. *Hoffman,* 31 Ohio St. 2d 163 (1972), cert. den. 93 S. Ct. 1370 (1973), it is clear that the conduct and epithets emitted under the set of facts and circumstances now before this Court do not fall within the purview of any constitutionally protected freedom.

II

THE UNITED STATES SUPREME COURT HAS DECIDED THE REQUISITE STANDARDS AS TO THE CONSTITUTIONAL VALIDITY OF THE DISORDERLY CONDUCT STATUTES AND THE CINCINNATI DISORDERLY CONDUCT ORDINANCE AS APPLIED TO THE FACTS HEREIN COMPLIES WITH THOSE REQUIREMENTS.

In June of 1972, this Court specifically decided and set forth definite standards regarding the constitutional validity of the disorderly conduct statutes. *Colton* v. *Kentucky,* 407 U.S. 104 (1972). Consequently, there is no basis for distinction as the factual complex and application of the statutory provisions herein raises issues identical to those recently decided by this Court in *Colten.*

The Cincinnati Disorderly Conduct ordinance, like that in *Colten* fully complies with the requirements of the Due

Process Clause of the Fourteenth Amendment as proscribed by the United States Constitution. Resort to epithets or personal abuse is not in any proper sense communication safeguarded by the Constitution and its punishment, as a criminal act would raise no question under that instrument. *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942).

This Court in *Cox* v. *Louisiana,* 379 U.S. 536 (1965), emphatically rejected the contentions now set forth by the instant petitioner. In applying those standards as set forth in the numerous decisions by this Court, the Ohio Supreme Court construed the instant ordinance as being limited to instances where there is no protected right. Wherefore individuals may not be convicted under the Cincinnati Disorderly Conduct ordinance for the expression of any constitutionally protected freedom.

Precisely, this Court held that where the highest state court has limited the application of the disorderly conduct statute to instances where there is no protected right, then such statute is not impermissibly vague or broad.[3] The Ohio Supreme Court has limited the instant ordinance to exclude constitutionally protected expression. *Cincinnati* v. *Hoffman,* 31 Ohio St. 2d 163, 285 N.E. 2d 714 (1972), cert. den. 93 S. Ct. 1370 (1973). The Ohio Supreme Court in *Hoffman* went on further to express that the

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[3] *Coates* v. *Cincinnati,* 402 U.S. 611 (1971); *Cohen* v. *California,* 403 U.S. 15 (1971); *Cox* v. *Louisiana,* 379 U.S. 536 (1965); and *Gooding* v. *Wilson,* 405 U.S. 518 (1972), are clearly distinguishable from *Colten* v. *Kentucky,* 407 U.S. 104 (1972), and *Cincinnati* v. *Hoffman,* 31 Ohio St. 2d 163 (1972), cert. den. 93 S. Ct. 1370 (1973). In *Coates, Cohen* and *Gooding,* the statutes involved therein infringed upon the First and Fourteenth Amendments of the United States Constitution. Those State Courts did not narrowly construe the application of the respective statutes and therefore said statutes were found to be unconstitutional.

standard of conduct being specified within the ordinance imposes an "objective" test as enunciated within the recent United States Supreme Court decisions on this issue.

Finally, in *Cohen* v. *California,* 403 U.S. 15 at 20 (1971), citing *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942), this Court has also held that the:

> ". . . states are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called 'fighting words', those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke reaction. . . ."

The Ohio Supreme Court in *Cincinnati* v. *Hoffman,* 31 Ohio St. 163 (1972) cert. den. 93 S. Ct. 1370 (1973), and later in *Cincinnati* v. *Karlan,* 35 Ohio St. 2d 34 (1973), has limited the instant ordinance to exclude constitutionally protected expression and limited punishment to the "fighting words" category. The Ohio Supreme Court in deciding *Hoffman* did not create a new standard of proscribed conduct but simply employed the same standard as already existed within the circumscribed ordinance. Precisely, the doctrine of "fighting words" has its roots in *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940). The application of that doctrine was reaffirmed in *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 at 571 (1942), when this Court observed that:

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances."

Instant Petitioner erroneously alleges that a finding of guilt was made based upon a mix of free speech and illegal

conduct.[4] The defendant contends that his conduct in forcing his way into the complainant's home and threatening to "kill" her is protected speech. Not so, for resort to epithets or personal threats to "kill" is not in any proper sense communication safeguarded by the Constitution and its punishment as a criminal act would raise no question under that instrument. *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942).

Unlike *Lewis* v. *City of New Orleans,* 415 U.S. —, 39 L. Ed. 2d 214 (1974), the case at bar does not involve the mere name calling of another individual.[5] Here, there is no conflict of testimony or dispute as to the conduct of the instant defendant as there was in the *Lewis* case.

Furthermore, the Supreme Court of the United States in *Cox* v. *Louisiana,* 379 U.S. 536 (1965), emphatically rejected the very contentions that the defendant here attempts to raise and held that:

> "It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written or printed."

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[4] Defendant cites *City of Cleveland* v. *Mechanic,* 26 O. App. 2d 138 (1971), which is distinguishable as the *Mechanic* case pertained to a defendant who was attempting to distribute literature expressing opposition to the Vietnam War. The *Mechanic* case involved the freedom to distribute information to citizens upon a public sidewalk and the right of those citizens to receive such information. However, the case at bar contains no issue involving any constitutionally protected freedom.

[5] In *Lewis,* decided February 20, 1974, the New Orleans ordinance under consideration dealt the prohibition against using obscene or opprobious language toward a city police officer. *Lewis,* was remanded for further proceedings for no limitation of "fighting words" was construed by the highest court of that state.

Consequently, it is clear that the instant defendant had no constitutional right to force entrance into a private residence, refusing to leave and then threatening bodily harm to the victim. Moreover, the facts herein are devoid of any issue capable of reaching constitutional magnitude and are not susceptible of application to protected speech.

CONCLUSION

The ordinance in question is sufficiently narrow and precisely drawn and the application of subject ordinance is in accordance with the constitutional mandates as enunciated within the decisions rendered by the United States Supreme Court.

Wherefore, in applying those standards as set forth in *Lewis* v. *City of New Orleans,* 39 L. Ed. 2d 214 (1974), it is evident for the reasons set forth above, that petitioner's application by writ of certiorari should be denied.

Respectfully submitted.

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